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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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09/960,114

09/21/2001

Kenneth B. Higgins

5113B

5752

7590

12/13/2006

Milliken & Company  
P.O. Box 1927  
Spartanburg, SC 29304

EXAMINER

JUSKA, CHERYL ANN

ART UNIT

PAPER NUMBER

1771

DATE MAILED: 12/13/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	09/960,114	HIGGINS ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	Cheryl Juska	1771	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 03 November 2006.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 88, 90, 92-123, 125-128 and 131 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 88, 90, 92-123, 125-128, and 131 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114.

### ***Response to Amendment***

2. Applicant's amendment filed November 3, 2006, has been entered. Claims 1 and 120-123 have been amended as requested. Claims 1-87, 89, 91, 124, 129, 130, and 132-149 are cancelled. Thus, the pending claims are 88, 90, 92-123, 125-128, and 131.

### ***Claim Rejections - 35 USC § 103***

3. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

4. Claims 88, 90, 92-123, 125-128, and 131 stand rejected under 35 U.S.C. 103(a) as being unpatentable over US 4,522,857 issued to Higgins in view of 5,610,207 issued to DeSimone et al. as set forth in section 3 of the last Office Action.

Applicant has amended independent claims 1 and 120-123 to limit the layer of foam to being a preformed rebond foam sheet. This new limitation is insufficient to overcome the

standing rejection because said limitation amounts to a method limitation in a product claim. As such, said limitation is not given patentable weight at this time. In order to be given patentable weight, a method limitation must materially effect the final product in a structural manner. The presence of process limitations on product claims in which the product does not otherwise patentably distinguish over the prior art, cannot impart patentability to the product. *In re Stephens*, 145 USPQ 656. The step of preforming the rebond foam sheet is not seen to differentiate the present invention from the final product of the prior art. Therefore, the rejection is maintained.

### ***Response to Arguments***

5. Applicant's arguments submitted with the amendment have been considered but are found to be unpersuasive.
6. The majority of applicant's arguments are duplicated from the last two responses by applicant (Responses filed 03/07/06 and 08/09/05). These arguments were addressed in detail in the prior Office Actions, and, thus, will not be repeated here.
7. One new argument presented by applicant is the assertion that DeSimone teaches away from the present invention of a "preformed rebond foam sheet" (Amendment, page 9, 1<sup>st</sup> paragraph). Specifically, applicant argues the rebond foam sheet of DeSimone "appears to be directed to an in-situ formation of a rebonded foam by mixing pieces of foam with liquid polyol and liquid polyisocyanate." (Amendment, page 9, 1<sup>st</sup> paragraph and page 16, 1<sup>st</sup> and 2<sup>nd</sup> paragraphs.) In response, it is reiterated that the *preformed* rebond foam sheet limitation is not given patentable weight at this time. In order to be given patentable weight, a method limitation

must materially effect the final product in a structural manner. Applicant has not established that the step of preforming the rebond foam sheet produces a structurally different product than the final product of the prior art. Therefore, applicant's argument is found unpersuasive.

8. Additionally, with respect to the sample of copying submitted previously, applicant states, "Presumably, in light of Applicant's products and publications, Interface started using a rebond foam layer in at least their European cushion back carpet tiles in about late 2004." (Amendment, page 16, 3<sup>rd</sup> paragraph). As detailed in the 10/07/05 Office Action, section 13, the sample is not labeled or documented in any way as to the carpet construction and source thereof. Hence, it is not clear that the sample is even a "copy" of the present invention. Additionally, applicant's mere statements that the competitor starting using a rebond foam layer in their European product is not sufficient evidence that said competitor expended great effort to develop its own solution. Alleged copying is not persuasive of nonobviousness when the other manufacturer had not expended great effort to develop its own solution. *Pentec, Inc. v. Graphic Controls Corp.*, 227 USPQ 766. Therefore, applicant's assertion of "copying" is not found persuasive.

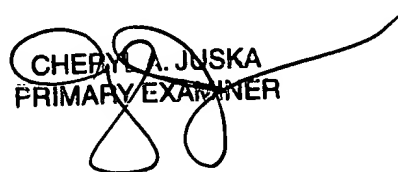
9. Applicant also argues that DeSimone does not disclose 'rebond foam employed as "carpet backing" (Amendment, paragraphs spanning pages 8-9 and 9-10). In response, it is reiterated that DeSimone teaches a rebond polyurethane foam product which is suited for a carpet backing (abstract and col. 2, lines 34-45). DeSimone employs the term "carpet backing" rather than carpet pad, underlay, or other common term used to describe a non-attached foam layer for placement under an installed carpet. As such, the examiner believes the DeSimone reference clearly teaches one skilled in the art that the rebond foam is suited for attachment as a

carpet backing layer. Furthermore, in response to applicant's statement of belief that the reference to "carpet backing" in DeSimone "is an example of woven or unwoven fabrics rather than to putting the recycled foam pieces...on the back of carpet," the examiner respectfully disagrees. In other words, applicant is arguing that the reference teaches the intended use of a fabric rather than a carpet construction. Note that said woven or unwoven fabrics are not "carpet backing" unless part of a carpet construction. Therefore, applicant's argument is found unpersuasive and the above rejections are maintained.

### *Conclusion*

10. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Cheryl Juska whose telephone number is 571-272-1477. The examiner can normally be reached on Monday-Friday 10am-6pm. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terrel Morris can be reached at 571-272-1478. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

11. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
CHERYL A. JUSKA  
PRIMARY EXAMINER